In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE MISSOURI PACIFIC RAILWAY COMPANY, appellant, *v.* THE UNITED STATES, APPELLEE. } No. 108.

PETITION FOR REHEARING.

The United States respectfully prays the court to grant a rehearing in the suit above entitled, for the reasons and causes following, to wit:

I.

If the appeal in this case had been disposed of solely on the merits of the controversy, a rehearing would not now be asked for by the Government. But as the case was disposed of on the ground that a court of equity had not jurisdiction to entertain the bill for an injunction at the suit of the United States, it is believed to involve consequences of importance far beyond the mere facts and interests directly shown on this record, and therefore to justify a request for a reargument on that point alone.

The power of the Congress to regulate commerce among the several States is supreme, exclusive, and unlimited except by the other provisions of the Constitution.

The defendant is a quasi-public corporation, exercising the public function of transporting commerce between the States, and as such is subject to the regulations imposed by the Congress of the United States for the government of such transportation and of such commerce.

That being so, such regulations as Congress may have imposed by law are by operation of the Constitution and the laws read into the charter of each incorporated common carrier by railroads engaged in such commerce as completely and fully as if such corporations had been originally chartered by Congress, and such regulations had been written in the laws creating them and made conditions precedent to the right of the defendant companies to engage in such transportation.

As the power of Congress to regulate commerce among the States is supreme, its regulations made in pursuance thereof state the terms on which that commerce may proceed, and no one may lawfully conduct interstate commerce upon any terms repugnant to such regulations. If this be true, then any common carrier who violates the regulations provided by Congress for the conduct of such commerce, violates the charter under which only it may lawfully participate in the transportation of such commerce.

Federal courts derive equity jurisdiction from the Constitution, Article III, section 2, and Judiciary Act, 1 Stat., section 16.

1 Bates Equity, 539.
Boyle v. *Zackery*, 6 Peters, 653.
Penn. v. *Wheeling Bridge*, 13 How., 563.
Osborne v. *U. S. Bank*, 9 Wheat., 738.

Equity, as administered by the high court of chancery in England, would, at the suit of the Government, enjoin corporations from violating the law where the public is injured.

Attorney-General v. *Great Northern R. R.* (1 Drury & Smale, 161).
Hare v. *L. & N. W. Ry.* (2 Johns & Hem., 80 Wood, V. C.).
Attorney-General v. *Mid. Kent Ry.* (L. R., 3 Ch., 100).
Buck Mountain Co. v. *Lehigh Co.* (50 Penn. St., 91).
Trust Co. v. *Georgia* (109 Ga., 747).
Penn. v. *Commonwealth* (29 Am. & Eng. cases, O. S., 145).
In re Debs (158 U. S., 564).
Attorney-General v. *Railroads* (35 Wis., 435).
T. A. A. & N. R. R. v. *Penn. Co.* (54 Fed. Rep., 741).

In the case of *Emperor of Austria* v. *Day and Kossuth* (3 De Gex, Fisher & Jones Reports, 217) a bill for an injunction was entertained to prevent the circulation of a large quantity of notes, which, though not in imitation of any notes circulating in Hungary, purported to be receivable as money in Hungary. The

injunction was granted on the ground that the sovereign might sue in his representative character, on behalf of the subjects of his kingdom, to prevent a pecuniary injury which a spurious circulation would inflict upon them.

The experience of recent years has proven the great value of the writ of injunction as an adjunct to government in maintaining the supremacy of the law and in preventing its future infraction. This was perhaps never more satisfactorily demonstrated than in the case of *Debs*, where the jurisdiction was expressly held to exist.

> *In re Debs*, 158 U. S., 564; see p. 599 *et seq.;* and *Ex parte Lennon*, 166 U. S., 548.

In the case of the *Toledo and Ann Arbor Railroad Company* v. *The Pennsylvania Company* (54 Fed. Rep., 730), an original bill in equity was filed in the United States circuit court to enforce the provisions of the third section of the act to regulate commerce. In this case there had been no previous hearing or order of the Interstate Commerce Commission.

On page 749 the court said:

> The subject-matter of this litigation is, therefore, the construction and enforcement of an act of Congress, and the court acquires jurisdiction because of the Federal question involved. That such question is involved I think too plain for serious controversy. It is sufficient to constitute a case for cognizance by a Federal court if it involves but a single ingredient or question dependent on the Constitution

or a law or a treaty of the United States, although it may at the same time involve any other questions that depend on the general principles of law.

Chief Justice Marshall, in *Osborne* v. *Bank* (9 Wheat., 738), considered this point and came to the following conclusion:

* * * * *

It is said the orders issued in this case are without precedent. Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was, therefore, in its time, without a precedent. If based on sound principles, and beneficent results follow their enforcement, affording necessary relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constantly varying demands for equitable relief.

This opinion was substantially confirmed in *Ex parte Lennon* (166 U. S., 548), where the jurisdiction of the lower court was directly challenged.

In the latter case this court said:

We think the bill exhibited a case arising under the Constitution and the laws of the United States, as it appears to have been brought solely to enforce a compliance with the provisions of the interstate-commerce act of 1887, and to compel the defendant to comply with such act, by offering proper and reasonable facilities for the interchange of traffic with complainant, and enjoining them from refusing to

> receive from complainant, for transportation over their lines, any cars which might be tendered them.
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> * * * * *

If, as in the Lennon case, in a situation "regulated and controlled by the interstate commerce act" (as the bill leading to the petition expressed it), and in a suit by private parties, without intervention by the Commission, the bill exhibited a case arising under the Constitution and laws of the United States, since it was brought to enforce a compliance with the provisions of that act, much more forcibly, we think, may that theory be advanced in support of action by the Government in a matter of public and general concern, whether or not the Commission has investigated or requested. And if without investigation, but from already known facts, the Commission requests action, that fact alone ought not to deprive the Government of a right which surely it would have possessed if there had been no action whatever by the Commission.

It has been supposed that the specific remedies mentioned in the act to regulate commerce are the only remedies that are open to enforce the provisions of that act. However that may be as to private suitors, it is not true as to the Government. It was settled in *Savings Bank* v. *The United States* (19 Wall., 239) that the rule respecting "exclusive remedy" does not apply to the United States. In that case Justice Strong, in delivering the opinion of the court, said:

> It must also be conceded to be a rule of the common law in England, as it is in Pennsyl-

vania and many of the other States, that where a statute creates the right and provides a particular remedy for its enforcement, the remedy is generally exclusive of all common-law remedies; but it is important to notice upon what the rule is founded. The reason of the rule is that the statute, by providing a particular remedy, manifests an intention to prohibit other remedies, and the rule therefore rests upon a presumed statutory prohibition. It applies and it is in force when anyone to whom the statute is a rule of conduct seeks redress for a civil wrong. He is confined to the remedy pointed out by the statute, for he is forbidden to make use of any other. But by the internal-revenue law the United States are not prohibited from adopting any remedies for the recovery of a debt due to them which are known to the laws of Pennsylvania. The prohibitions, if any, either express or implied, contained in the enactment of 1866, are for others, not for the Government. They may be obligatory upon tax collectors. They may prevent any suit at law by such officers or agents. But they are not rules of conduct for the State. It is a familiar principle that the King is not bound by an act of Parliament, unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate), affect not him in the least if they may tend to restrain or diminish any of his rights and interests. (*Magdalene College Case*, 11 Coke, 74; *King* v. *Allen*, 15 East, 333.) He may even take the benefit

of any particular act, though not named. (Case of a Fine Levied, etc., 7 Coke, 32; Pott. Dwarris, 151, 152.) The rule thus settled respecting the British Crown is equally applicable to this Government, and it has been applied frequently in the different States, and practically in the Federal courts. It may be considered as settled that so much of the royal prerogative as belongs to the King in his capacity of *parens patriæ*, or universal trustee, enters as much into our political state as it does into the principles of the British Constitution. The reason of the rule which denies others the use of any other than the statutory remedy is wanting, therefore, in applicability to the Government, and the rule itself must not be extended beyond its reason.

See also *Comlth.* v. *Baldwin*, 1 Watts (Pa.), 54.

II.

Because the Attorney-General, irrespective of any request or previous investigation by the Interstate Commerce Commission, is charged with the duty of enforcing the provisions of the "Act to regulate commerce" and to prevent violations thereof, and the quality of the action of that officer in bringing this suit (notwithstanding the averment in the amended bill that he was moved thereto by a request from the Interstate Commerce Commission) ought not to be determined thereby, if the other averments of the amended bill made a case of which the court to which it was addressed could take cognizance. We claim that the admitted averments here did make such a case.

In the Joint Traffic case (Record, No. 84, October term, 1898, p. 48) the bill was filed upon a request of the Interstate Commerce Commission—"they considered the contract, etc., to be in conflict with the act to regulate commerce." The proceedings instituted invoked both that act and the anti-trust law. The case was heard on bill and answer, and the statement of facts and opinion in this court make no reference to the request of the Commission nor to any previous investigation by them. In point of fact there was a certain investigation, but apparently no finding of facts. At all events, this case, in which by demurrer the facts are admitted and only questions of law are raised, calls for previous investigation and findings by the Commission even less than the Joint Traffic case; for although the issue there was also substantially a pure question of law, viz, whether the agreement violated the Sherman act, yet there was an answer and not a demurrer, and the facts did not pass so completely unchallenged as here.

III.

Because, it is submitted, the majority of the court seem to have been of the opinion that the matters charged in the amended bill were presented to the Interstate Commerce Commission, and that, therefore, it was the duty of that body to investigate such matters; and that it was not within the power of the Commission to transfer the controversy to the courts by requesting the Attorney-General to institute proceedings, whereas the record does not show that said matters were presented to the Commission so that it

became the duty of that body to investigate them, and as a matter of fact no complaint regarding the subject-matter of this case was ever presented to the Interstate Commerce Commission.

IV.

Because this court apparently decided that the "act to regulate commerce" took from the general Government its inherent right to enforce all public laws by civil suit, whereas there is no warrant in the act itself for the conclusion that Congress intended to interfere with or limit the right of the Government to protect public rights in any manner theretofore recognized by law. Because the majority of the court in this case decided generally that the United States has no power by original bill to enforce the "Act to regulate commerce," and thereby in effect overrules *In re Debs* (158 U. S., 564), *Savings Bank* v. *United States* (19 Wall., 227), and *Ex parte Lennon* (166 U. S., 548).

V.

Because a setting aside of the decision and a ruling that the Government had the right to institute and maintain this suit will in nowise conflict with the opinions of this court, in which it is held that in proceedings originating before the Commission, the courts will not proceed to an original investigation of the facts which should have been passed on by the Commission. (*East Tennessee, etc., R. R. Co.* v. *Interstate Commerce Commission*, 181 U. S., 1, and cases cited.) That case simply holds that the court will refuse, if it sees

fit, to exert its original judgment on the facts when it considers that it is entitled to the aid afforded by the previous judgment of the Commission. Here the facts appeared by the demurrer, admitting that the charges were absolutely (not relatively) excessive and unreasonable, as well as discriminatory against the particular point.

VI.

The important question now emphasized was not fully argued in the briefs nor orally before the court. The opinion cites no authorities, and does not discuss the question, but simply states it and disposes of it very briefly by holding that where there is no hearing by the Commission, no finding of fact and no order against the carrier, the law in force at the time did not give authority to bring the suit. The law is contained in sections 13 *et seq.* of the "Act to regulate commerce," as amended by the act of March 2, 1889. Section 13 provides for complaints against carriers by private parties, and makes it the duty of the Commission to investigate if complaints are not satisfied. Section 14 provides that whenever an investigation shall be made, the Commission shall make a report in writing, including findings of fact and its recommendation, which findings are to be *prima facie* evidence as to the facts in all judicial proceedings. This section does not in terms or by implication, we respectfully submit, restrict legal proceedings to a case where there has been investigation; certainly it does not as to suits by the Government as *parens patriæ*. The same contention is true respecting section 15, by which, in case of

investigation, if the Commission finds that a common carrier has committed any injury or damage to a complainant, the carrier shall be notified to desist from violation of law, or to make reparation for the injury. By the sixteenth section, if a carrier does not obey such order, it shall be lawful for the Commission, or for any private party interested, to apply summarily to the circuit court in order that by injunction or mandatory process the carrier may be compelled to obey the order of the Commission. When the Commission files such petition, it is made the duty of the district attorney, under the direction of the Attorney-General, to prosecute the same.

It seems impossible to maintain from this section, giving the Commission a right to enforce its order after investigation and findings of fact, and directing the Attorney-General to aid the Commission to this effect, that this gives an exclusive remedy, and that the ordinary right and broad power of the Government acting through the Attorney-General, to enforce obedience to law by all the usual and proper remedies, legal or equitable, have thereby been withdrawn or curtailed. Nothing else in the law as it existed when this suit was begun, and when it was decided below, can be found to sustain the view that *quoad* the Government, as well as private parties, it cut off previous remedies and substituted an exclusive one. And the Lennon case shows that this court has not attributed to the law this effect even as to private parties.

If the United States is not prohibited from adopting any common law remedy for collecting what is due it,

and if this is true on general principles, as was decided in the case of the Dollar Savings Bank, *ut supra*, with equal or even greater force can it be contended that all equitable remedies are open to the United States. And we respectfully insist that on careful consideration it can not be doubted that although the act to regulate commerce defines the method which the Commission must follow in enforcing the law, nothing in that act, irrespective of the Elkins amendment, limits or was intended to limit the broad, primary, and fundamental power of the Government to invoke all existing remedies, legal and equitable, in performing its public duties and enforcing public rights.

We respectfully submit that a proper case is made out for reargument, and request that the court in its discretion will order the same.

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We hereby certify that in our opinion the foregoing petition for rehearing is well founded in point of law.

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